Supreme Court

CASE #92 535

IN THE

SUPREME COURT OF THE UNITED STATED

OCTOBER TERM, 1992

CHARLES WILLIAM O'BRIEN

(F & S PROPERTIES),
(WKH CORPORATION),
(HWK CORPORATION),
(HKW PROPERTIES),
(JASPER INVESTMENT CORPORATION),

Petitioner

v.

BANK ONE, COLUMBUS, N.A.

Respondent

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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October, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ohio Civil Rule 3(A) commencement requirement that service be obtained within one (1) year of filing in order to properly commence an action is extended by the filing of an Amended Complaint, and, thus, accords due process.

2. Whether refusal to mail court filings and/or refusal to re-mail court filings by ordinary mail after certified mail of such filings have been returned to opposing counsel as "unclaimed", constitutes notice of such filings sufficient to accord the affected party due process.

THE PARTIES

The parties are Petitioner, Charles William O'Brien, Petitioners, F&S Properties, WKH Corporation, HWK Corporation, HKW Properties, and Jasper Investment Corporation, Respondents, Bank One, Columbus, N.A., Respondents Merit Savings Association, Lyndon Guaranty Bank of Ohio, and Respondent, Freedom Federal Savings & Loan Association.

TABLE OF CONTENTS

Questions Presented for Review.....i

The Parties.....ii

Table of Contents.....iii

Table of Authorities.....iv

Opinions Below.....v

Jurisdiction Invoking this Court's Jurisdiction.....1

Statement of the Case.....2

LAW AND ARGUMENT

Petitioners' Petition for Writ of Certiorari is not in compliance with the provisions of either Rule 14 or Rule 33 of the Rules of this Court.....10

All parties to the litigation were properly served under Ohio Civil Rule 3(A), and hence, the trial court had proper jurisdiction over all parties. Accordingly, the tral court's entries of judgment should be affirmed.....11

Conclusion.....26

Certificate of Service.....28

TABLE OF AUTHORITIES

Cases

Goolsby v. Anderson, 61 Ohio St. 3d 549, 550 (1991).....18,19,21,22

Sirower v. Club South Investments Co., Inc., Case #88 AP 169 (Franklin County 1988, unreported)....18

Maryhew v. Yova, 11 Ohio St. 3d 154, 464 N.E. 2d 538 (1984).....19

Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E. 2d 642 (1977).....19

St. Thomas Hospital v. Beal, 2 Ohio St. 3d 132, 443 N.E. 2d 504 (1981)....23

Sate, ex re. Ballard v. O'Donnell, 50 Ohio St. 3d 182, 553, N.E. 2d 650 (1990).....24

Rules of Civil Procedure

Rule 1(B).....15, 16, 17, 21

Rule 3(A).....11, 14, 16, 17, 21,22

Rule 4.....13

Rule 15(A).....19

Rule 15(C).....13

Rule 60(B).....12

Statutes

Ohio Revised Code Section 2305.17.....14

OPINIONS BELOW

The prior opinion most pertinent to the pending Petition and the judgment under review is the December 31, 1991 decision of the Tenth District Court of Appeals of Ohio, Bank One, Columbus, N.A. vs. Charles William O'Brien, et al., 91 AP 165; 91 AP 440. A petition for discretionary review was denied by the Supreme Court of Ohio on June 24, 1992. The decision under review and the order denying review are reproduced in the Appendix of this Brief.

JURISDICTION INVOKING THIS COURT'S JURISDICTION

None of the arguments set forth herein invoke this Court's jurisdiction pursuant to the provisions of Rule 17 of the Revised Rules of the Supreme Court of the United States, nor do they invoke this Court's jurisdiction pursuant to either the United States Constitution or any statute promulgated thereunder. All issues raised herein are matters of state law which have been fully and properly adjudicated by the Courts of the State of Ohio. Absent a federal question, this Court has no jurisdiction over this Petition. See, e.g. Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 90 L.Ed. 897, 75 S.Ct. 614 (1955).

STATEMENT OF THE CASE

Bank One, Columbus, N.A. ("Bank One") filed its Complaint on March 18, 1989, against Petitioner Charles William O'Brien ("O'Brien") and his wife Karen Sue O'Brien, and obtained judgment on three (3) cognovit notes. Said judgment was vacated on June 7, 1989, and Bank One was permitted to file its First Amended Complaint.

Bank One's First Amended Complaint added as defendants, Merit Savings Association ("Merit"), Lyndon Guaranty Bank of Ohio ("Lyndon") and Freedom Federal Savings Association ("Freedom"), which were additional lenders to all Petitioners, and also added F&S Properties, WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation (collectively the "Entities") as defendants. The additional loans

made by Merit, Lyndon and Freedom to the O'Briens and the Entities were collateralized by the same properties previously given as collateral by the O'Briens to Bank One to secure Bank One's loans and evidenced by the three (3) cognovit notes subject to this litigation. Merit and Lyndon filed their Answers to Bank One's First Amended Complaint on July 10, 1989. Subsequently, when their loans went into default, Merit and Lyndon obtained leave and filed Crossclaims against O'Brien and the Entities, seeking foreclosure of the properties, a determination of the priority of all liens, and also an Order that the properties be sold and the proceeds applied to reduce Merit and Lyndon's obligations.

Bank One obtained leave and filed its Second Amended Complaint on Septem-

ber 6, 1990. Merit and Lyndon filed their Answers and Crossclaims to the Second Amended Complaint, which were identical to the First Answers and Crossclaims in the Federal District Court, Southern District of Ohio, Eastern Division, because O'Brien improperly had attempted to remove the case. The case was remanded to the Franklin County Court of Common Pleas by the District Court, whereupon Merit and Lyndon refiled their Answers and Crossclaims in the Court of Common Pleas, even though the trial court had ruled that the Federal Court filings already were properly before the court. On February 12, 1991, the trial court entered a default judgment against O'Brien, Karen Sue O'Brien and the Entities in favor of Bank One. Merit and Lyndon obtained default judgments against Karen Sue

O'Brien that same day, and then obtained summary judgment against O'Brien and the Entities on July 26, 1991.

In the various lenders' attempts to collect on their obligations, and their efforts to foreclose on the properties subject to the mortgages in this matter, because of O'Brien's approach, this litigation has dragged needlessly on for more than three and one half (3-1/2) years, has required a substantial amount of several courts' time with the filing of well over 500 pleadings and motions in the trial court, 90 pleadings and motions in the United States District Court, Southern District of Ohio, (many of which were found to be frivolous), numerous frivolous interlocutory appeals by O'Brien to the Court of Appeals of Ohio, to the Ohio Supreme Court and appeals to the United States Court of Ap-

peals for the Sixth Circuit and now to this Court.

In order to spare the Court the agony of relating the tortured history of this litigation, Respondents Merit and Lyndon will simplify the issues before this Court by explaining that the underlying basis of this litigation was Bank One's attempt to obtain judgment and foreclosure on three (3) mortgage notes and deeds executed by Charles William O'Brien and Karen Sue O'Brien in its favor.

Once the O'Briens defaulted on the Bank One mortgages, Bank One prepared to foreclose by filing a Complaint on its cognovit notes. While Bank One was preparing to foreclosure upon its cognovit judgment, O'Brien filed a Motion for Relief from Judgment pursuant to the provisions of Ohio Civil Rule

60(B), which Motion was granted. Accordingly, Bank One performed a title search, and discovered that, prior to the recording of a number of fraudulently altered mortgage releases in January, 1987, the O'Briens had proceeded, in 1986, to convey title to all the properties subject to Bank One's mortgage to the Entities. Subsequently, the O'Briens caused the Entities to apply for and obtain loans from Merit, Lyndon and Freedom, all of which are defendants in the action. These loans were secured by first and second mortgages on the properties, with Merit and Lyndon's being first liens on their subject properties, Bank One's mortgages having been released by operation of the fraudulently altered releases.

Throughout the pendency of the lower court action, Petitioners have con-

tended that, pursuant to an extremely technical interpretation of Ohio Civil Rule 3, the First and Second Amended Complaints filed by Bank One were not timely served, and that, as a result, the Franklin County Court of Appeals erred in affirming the judgment entered against them in its Opinion in Cases #91 AP 165 and #91 AP 440 (consolidated).

Despite the fact that these solely are issues of state law, which have been fully adjudicated by the relevant state courts, and do not raise issues of great general interest or constitutional importance, Petitioners seek relief from this Court. However, as Petitioners' own conduct has been the cause of their problems, this Court should not sanction their efforts to further delay these proceedings by petitioning this Court.

It should be noted that Question #2 presented for review by Petitioners does not apply to either Merit or Lyndon, and accordingly, neither Merit nor Lyndon will respond to it.

LAW AND ARGUMENT

1. PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NOT IN COMPLIANCE WITH THE PROVISIONS OF EITHER RULE 14 OR RULE 33 OF THE RULES OF THIS COURT.

It should be noted that the Petition is thirty nine (39) pages in length, and subject to denial pursuant to the provisions of Rule 14.5. Further, it should be noted that the Petition for Writ of Certiorari is not in compliance with the requirements of Rule 33.1(E), in that the size of the typed matter exceeds the 4-1/8" x 7-1/8" requirement in that the text of the Petition measures 4-1/2" x 6-1/2". Again, and pursuant to the provisions of Rule 14.5, this is grounds for denial of the Writ.

Last, Petitioners' Petition fails to set forth grounds for this Court to accept jurisdiction on Writ of

Certiorari, as set forth in Rule 10.1.

2. ALL PARTIES TO THE LITIGATION WERE PROPERLY SERVED UNDER OHIO CIVIL RULE 3(A), AND HENCE, THE TRIAL COURT HAD PROPER JURISDICTION OVER ALL PARTIES. ACCORDINGLY, THE TRIAL COURT'S ENTRIES OF JUDGMENT SHOULD BE AFFIRMED.

The Entities contend that the trial court lacked jurisdiction over the parties to this litigation. Their argument for lack of jurisdiction claims that Bank One failed to effectuate service within one (1) year of filing its Complaint, pursuant to Rule 3(A). As more fully set forth below, said arguments are not well-taken and must fail.

The original Complaint, filed by Bank One, was filed on March 17, 1989. This Complaint sought judgment on cognovit notes signed by Charles William O'Brien and Karen Sue O'Brien. There was no reason for the Entities, Freedom,

Merit or Lyndon to be parties to the initial Complaint. Judgment on the cognovit notes was entered in favor of Bank One on March 17, 1989. Subsequently, O'Brien filed a Rule 60(B) Motion for Relief from this judgment. At this time, Bank One learned of the existence of the Entities and of the loans made by Merit, Freedom and Lyndon, and by leave of the trial court, amended its Complaint to include the Entities and the other lenders as parties. Leave to amend the Complaint, as well as O'Brien's Rule 60(B) motion were granted on June 7, 1989. On May 8, 1990, notice of receipt of personal service of summons on HWK Corporation, WKH Corporation and Jasper Investment Company was filed. On June 7, 1989, Merit's cross-claim was properly served.

Service of summons on HKW Corporation, WKH Corporation and Jasper Investment Company was proper. Civil Rule 3(A) is not applicable to this situation because it allows amendments to relate back to the original complaint when the statute of limitations has expired, provided certain requirements are met. Civil Rule 4, on the other hand, determines when an action is commenced, and allows the use of Rule 15(C) only when the defendant is incorrectly named. This is not the situation in the instant case, as the unusual circumstances involved in this case required the addition of parties, not the correction of any misnaming of defendants. Hence, the amended complaints do not relate back to the original complaint, since they deal with different substantive matters.

Additionally, the Entities' arguments that the initial action was not commenced against all parties within the one year requirement of Civil Rule 3(A) must fail for other reasons. Rule 3(A) provides in relevant part:

> A civil action is commenced by filing a complaint with the Court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Rule 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D).

The staff notes to Civil Rule 3(A) provide:

> ...The service within one year requirement is retained from Section 2305.17, R.C., as amended in 1965, and is based on the philosophy that dockets should be cleaned if, within réasonable time within one year, service has not been obtained.

O.R.C. 2305.17 provides:

> An action is commenced within the meaning of Sections 2305.03 and 2305.22, inclusive and Sections 1302.98 and 1304.29 of the Revised Code, by filing a petition in the office of the clerk of the proper court, together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

It is interesting to note that Civil Rule 3(A) does not exclude amended complaints. This construction of Civil Rule 3(A) is in accord with Civil Rule 1(B), which provides:

> (B) Construction. <u>These rules shall be construed and applied to effect just results by eliminating delay</u>, unnecessary expense and all other impediments to the expeditions administration of justice. (emphasis added)

The staff notes to Civil Rule 1(B) state:

> Rule 1(B) Construction:
>
> Rule 1(B) states that these rules shall be construed and applied as to facilitate the expeditious administration of

> justice. Hence, emphasis is placed upon the liberal construction rather than upon technical interpretation.

If Petitioners' incredibly technical interpretation of Rule 3(A) is accepted, the result would not promote "the expeditious administration of justice", and would reward the Petitioners' bad faith and dilatory tactics, which are amply demonstrated in the record. Further, it is an established maxim of law that whenever possible, cases should be adjudicated on their merits and not on procedural issues. If Civil Rule 3(A) is liberally construed as required by Civil Rule 1(B), expeditious administration of justice based on the merits of the case will result, and Petitioners' bad faith and dilatory tactics will not be rewarded.

Indeed, Civil Rule 3(A)'s stated philosophy is to clear dockets; however,

the technical construction of Civil Rule 3(A) advanced by Petitioners' would circumvent justice in the instant case by forcing the lenders to go back and start over again, and would also contradict the policy and requirements of Civil Rule 1(B). Only a liberal construction of Civil Rule 3(A) facilitates the "expeditious administration of justice", as encouraged by Civil Rule 1(B)'s staff notes. Petitioners seek an inflexible and technical interpretation of the rules in the hopes of further delaying the orderly progress of this litigation.

> A purely technical application of Civil Rule 3(A) would result in a finding that Goolsby had not commenced her action, despite the fact that the first complaint was filed and a demand for service was made within the limitations period prescribed by statute. Yet, it is not disputed that had Goolsby dismissed her com-

> plaint and again filed it at the time when instructions for service were given, the action would have been commenced according to Civil Rule 3(A). We believe that under these circumstances the Civil Rules should not require a plaintiff to refile...Such an exercise could not be said to "effect just results by eliminating delay, unnecessary expenses and all other impediments to the expeditious administration of justice.

Goolsby v. Anderson Concrete Corporation, 61 Ohio St. 3d 549, 550 (1991).

Sirower v. Club South Investments Co., Inc., Case #88 AP 169 (Franklin County 1988, unreported), heavily relied upon by the Entities, is easily distinguishable from the instant case. In that case, the Court was faced with a $900 default judgment taken on August 14, 1986, but where service was not completed until September 22, 1987. In Sirower, the Plaintiff failed to seek leave to file an amended complaint, as

Bank One did here. Further, Sirower did not address the issue raised here: whether the filing of an amended complaint with leave of court pursuant to Civil Rule 15(A) extends the one year period for obtaining service to the date of the filing of the amended complaint. The other cases relied upon by the Petitioners, Maryhew v. Yova, 11 Ohio St. 3d 154, 464 N.E. 2d 538 (1984) and Lash v. Miller, 50 Ohio St. 2d 63, 362 N.E. 2d 642 (1977) also fail to reach this question. Thus, both are distinguishable, and are inapplicable to the instant case. Further, the Ohio Supreme Court's recent decision in Goolsby, as set forth above, disposes of this argument.

Since both the applicable case law and the Civil Rules allow service to be effectuated within one year of the fil-

ing of the Amended Complaint, proper service was effectuated on O'Brien, Karen Sue O'Brien and the Entities well within the one year time limit. Hence, the trial court had jurisdiction over all the parties to this litigation, and its judgment should be upheld.

Bank One instructed the clerk to serve Karen Sue O'Brien, F&S Properties and HWK Corporation. On August 3, 1989 service by certified mail failed. On February 27, 1989, personal service failed. On April 9, 1990 ordinary mail service on the Entities, c/o Tammy M. Cordell, statutory agent, failed, and finally on April 25, 1990 service by publication failed. Bank One aggressively attempted to serve the three parties who had not been served as of June 7, 1990. These attempts to serve the parties beyond the statutory limit of

the filing of the original complaint on the cognovit notes were proper.

Proper service to commence an action must occur within one year of the date of that action was filed, or one year from the date of the action was refiled, if refiled within the original one year limit. Goolsby v. Anderson Concrete Corporation, 61 Ohio St. 3d 549 (1991).

In Goolsby, the request for service was not made until two days prior to the end of the one year statutory limit. Service was obtained four days after the one year limit expired. The court held that a strict, technical application of Rule 3(A) would cause harsh and inefficient results for the party suffering the burden of this rigid application of Rule 3(A), who would nevertheless be free to file the same action again.

Adhering to the efficiency requirements promulgated by Rule 1(B), the Court held:

> [W]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within the rule would provide an additional year within which to obtain service and commence the action under Civil Rule 3(A), an instruction to attempt service on the complaint would be equivalent to a refiling of the complaint".

Goolsby, 61 Ohio St. 3d at 551. This strict technical application of Rule 3(A), expressly rejected by the Ohio Supreme Court in Goolsby, is identical to the argument advanced by the Entities herein.

Accordingly, Bank One need not have requested leave to file a second amended complaint. The April 25, 1990 request for service, which was well within the one year limit of the filing of the pre-

ceding First Amended Complaint, extended the statutory limit to April 25, 1991. Prior to this date, the Entities responded to the Amended Complaint by filing a motion in Federal District Court to request further time to move or plead by Karen Sue O'Brien, F&S Properties and HWK Corporation. Furthermore, the successful personal service on the Entities on May 8, 1990 properly commenced the action. If service is obtained within one year of filing the Complaint, the case is commenced on the date of that filing for the purposes of the statute of limitations. However, where service is obtained more than one year after the filing of the complaint, then the case is deemed commenced on the date service is obtained. St. Thomas Hospital v. Beal, 2 Ohio St. 3d 132, 443 N.E. 2d 504 (1981).

Petitioners contend that the trial court had no jurisdiction to proceed, citing State, ex rel. Ballard v. O'Donnell, 50 Ohio St. 3d 182, 553 N.E. 2d 650 (1990). In Ballard, the Court held that in order for a court to acquire jurisdiction, proper service or an appearance must be made. The Petitioners conveniently forget that they made an appearance in the District Court on November 19, 1990. Hence, this argument must fail.

Since both the applicable case law and the Civil Rules allow service to be effectuated within one year of the filing of the Amended Complaint, and its accompanying request for service, service was effectuated upon Charles William O'Brien, Karen Sue O'Brien and the Entities well within the one year limit. Therefore, the trial court had

jurisdiction over all the parties, and the First Proposition of Law is meritless.

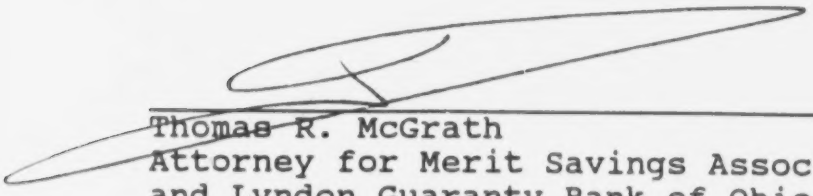
CONCLUSION

As set forth above, the state courts of Ohio have properly disposed of Petitioners' arguments while sending them a strong message that their bad faith dilatory conduct and their contempt of the courts of the State of Ohio will not be tolerated. This Court's acceptance of jurisdiction over this Petition for Writ of Certiorari would be tantamount to rewarding Petitioners for their bad faith and dilatory conduct, a precedent that this Court surely does not want to set. Accordingly, and for the reasons set forth herein, Respondents Merit Savings Association and Lyndon Guaranty Bank of Ohio respectfully request that this Court refrain from granting the Petition for Writ of Certiorari, and that it affirm the deci-

sions of the State courts of Ohio.

Respectfully Submitted,

McGrath, Kaufman & Hatcher Co., L.P.A.



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing Joint Brief in Opposition to Writ of Certiorari was mailed, regular U.S. mail, postage prepaid, to Charles William O'Brien, Post Office Box, 8369, Columbus, Ohio 43201; Lee C. Mittman, Attorney for Karen Sue O'Brien, 65 South State Street, Columbus, Ohio 43215; Gina Dougherty, Attorney for WKH Corporation, HWK Corporation, HKW Properties and Jasper Investment Corporation, 336 South High Street, Columbus, Ohio 43215; Nelson E. Genshaft, Attorney for Freedom Federal Savings & Loan Association, 41 South High Street, Columbus, Ohio 43215; Michael W. Donaldson, Attorney for Plaintiff and Third-party Defendants, 52 East Gay Street, Columbus, Ohio 43216-1008; Mr. Guttermaker

Co., Inc., 4482 Johnstown Road, Gahanna, Ohio 43230; The First Federal Savings Bank, c/o Kirk Sampson, 120 East Fourth Street, Cincinnati, Ohio 45202-4007; Luke A. Meadows, 1367 Republic Avenue, Columbus, Ohio 43211; Ralph E. Dill, 37 West Broad Street, Suite 950, Columbus, Ohio 43215; and Wilcox & Schlosser Co., L.P.A., 4937 West Broad Street, Columbus, Ohio 43228; on this 21st day of October, 1992.

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